Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, PETITIONER,

versus

S. HENDRICKS, JR., RESPONDENT

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

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1. IN REPLY TO RESPONDENT'S FIRST CONTENTION

Two reasons have been urged by petitioner for granting the writ herein, the first of which is:

That the Lower Court created a conflict between the decisions of the Federal Appellate Courts when (a) it asserted that "(t)he language of *Miller* was manifestly intended . . . . as a substantial change in diversity Jurisdiction"; and (b) it had so declared in *Miller* as follows:

> "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity

determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

Now, three counter statements made in Respondent's Brief in Opposition challenge petitioner's contention that to hinge diversity Jurisdiction to the citizenship of the wrongful death action beneficiaries, rather than that of their representative has created a conflict between the decisions of the Federal Appellate Courts. These counter statements are:

"The Lower Court has not created a conflict between the decisions of the Federal Appellate Courts. (Opp. Br., p. 1.)

"It is also respectfully submitted that no decision has been discovered wherein the rule of this case has been advanced before and rejected by any Federal Court post-*Kramer*." (Opp. Br., p. 2.)

"If such a conflict exists it is only latent in nature and would more properly be resolved in a controversy wherein the conflict, if any, is overt and patent." (Opp. Br., p. 2.)

It would be difficult to conceive of a case that raises the issue more obviously and patently than the present case[1] nor one that strikes down a petitioner more completely than does the one herein. But passing over this flaw in Respondent's argument we come to its total repudiation by the decided cases in conflict, e.g. *Bush v. Carpenter Bros.*,

[1] It should be noted that Respondent has at every stage of this case until now acknowledged the patent effect of the new rule declared by the Fourth Circuit. At pages 4 and 5 of Respondent's Brief on appeal to the Fourth Circuit states:

"We do, however, contend that the *Miller* Court, in stating that it had decided 'to hinge the diversity determination to the citizenship of the wrongful death action beneficiaries rather than to their representatives. . . .' mean exactly what it said. That is, in all cases involving questions under 28 U. S. C. Sec. 1359, like the one presented herein, the Fourth Circuit Court of Appeals has decided to apply this standard to determine whether or not 'any party has been improperly or collusively made or joined to invoke the jurisdiction of such Court'."

447 F. (2d) 707 (5th Cir., 1971) wherein the Fifth Circuit Court declared: "It is well established that where the personal representative of the decedent is authorized by statute to bring suit to recover for the death of the decedent, he is the real party in interest within the meaning of that term as used in Rule 17 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. and that his residence will be looked to in determining the existence of Federal diversity jurisdiction in the ordinary case." And in *Majors v. Purnell's Pride, Inc.*, 360 F. Supp. 328 (N. D. Miss., 1973), some two years later the District Court follows the Fifth Circuit Court's rule that the citizenship of the representative and not the beneficiary controls, declaring:

> "Generally it has been the rule in this district, approved by the Fifth Circuit, that the citizenship of the fiduciary rather than that of the beneficiaries is controlling on the question of diversity."

2. IN REPLY TO RESPONDENT'S SECOND CONTENTION

Respondent's counsel urges upon the Court a pragmatic avoidance of the issue and resolution of the problem as follows:

> "2. If this Court deems the Lower Court's ruling to have created a conflict between the decisions of the Federal Appellate Courts the Respondent would urge this Court to ratify the rule of the Fourth Circuit by denying the relief sought by the present Petition and refusing to grant the Writ prayed for therein."

The short answer to this suggestion is that this would only serve to multiply the adverse effects of what the Fourth Circuit Court itself cited as a contra view in footnote 13 of its opinion in *Miller*. This footnote of the Fourth

Circuit Court's opinion cites Case Note, 30 Wash & Lee L. Rev. 282, 294-5 (1973) which states the following:

> "The Fourth Circuit felt that the federal forum should be allowed the Millers to fulfill the dictates of the basic policy underlying diversity jurisdiction and so reached a result that permitted it. However, its reasoning is strained; desire to avoid deciding a constitutional issue should not involve torturing logic to accomplish that end. While the Millers got their federal forum, it is not clear that the Fourth Circuit intended its holding to be limited to *Miller*. Rather, the language of the court indicates that a substantial change in diversity determination was intended. This represents an unsatisfactory result overall; while equity was done, the repercussions will seemingly go far beyond *Miller*, **since the new test for diversity in such actions flies in the face of the Supreme Court and other circuits.**"

But there is even more basic and important reason why the suggestion made by Respondent must be rejected as inappropriate because of a cardinal issue that exists in this case . . . **which issue has been completely avoided in Respondent's Brief**. That issue was summed up at page 4 of the Petitioner's petition, as follows:

> "The focal point of this petition for a writ of certiorari is the Fourth Circuit Court's making a substantial change in diversity citizenship on its own to the extent of **legislating new statute** or **promulgating a new rule** in the important area of jurisdiction, properly for **Congress** or **this Court**.

Petitioner urged this reason for granting the writ under the ground that "The Lower Court Has So Completely Exceeded its Judicial Authority and Function as to Require this Court to Exercise its Power of Supervision to Correct Such Excess."

The statutory character of the Fourth Circuit Court's action is demonstrated, for instance, by a succinct observa-

tion made by the District Court during the course of the evidentiary hearing on Respondent's motion.

> The COURT: "To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative." Now the thing that concerns me: Why do they need a statute?
>
> Mr. FERGUSON: I don't know. That is a good question.
>
> The COURT: If they can hinge it on the citizenship of the beneficiaries, why can't they hinge it on the citizenship of the decedent?

(Petition Appx., p. 29)

The fact that the Fourth Circuit determined to do on its own what has been recognized as requiring a statutory enactment is also borne out by the following colloquy between Court and counsel for Respondent:

> The COURT: You are right about that. If you had one child in four different states, it would be the citizenship of the decedent that would govern, whoever brought the suit. That is how I read it in the beginning.
>
> Mr. FERGUSON: Right.
>
> The COURT: And that is the one that should be adopted.
>
> Mr. FERGUSON: Yes, sir. And I think that in their opinion, **it would take congressional action** to adopt such.

(Petition Appx., p. 26)

Apparently in the Lower Court's view and that of Respondent's counsel some problem stems from what Respondent's counsel stated in its brief to the Fourth Circuit Court:

> "Without stating the facts of *Kramer*, we think it will suffice to say that while the United States Supreme Court indicated a change in approach to the resolution

of questions raised under 28 U. S. C. Sec. 1359, that Court did not lay down any definite rule or promulgate any set standard for courts to apply in determining whether or not an assignment or appointment of a fiduciary falls within the prohibitions of the said statute."

If there is need for a standard to be set, it is for this Court to set. If there is need for legislation it is for Congress to enact. As stated in the Petition this is manifestly a case calling upon this Court for the exercise of its historic, inherent, and quite necessary power of supervision to maintain reasonable and fair uniformity in the administration of justice between the respective Circuit Courts of the federal judiciary; and not allow the Fourth Circuit Court's invasion of the functions of Congress and this Court to stand.

Respectfully submitted,

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C.G. BISHOP, Administrator of the Estate of
Arthur Lee Baker, Jr., Deceased, Petitioner,
versus
S. HENDRICKS, JR., Respondent.

ADDENDA SHEET TO PETITIONER'S REPLY BRIEF
TO RESPONDENT'S BRIEF IN OPPOSTION

[PREFACE NOTE: Petitioner was unable to lodge this portion of the Reply Brief with the printer in time for it to be printed; but believing that it relates to an important consideration respectfully submits it in this form]

QUERY: Does the Lower Court's Double-Expression Language Incorporated in its Opinion in the Case at Bar Sanctify and Sustain its Declaration in *Miller* of a Substantial Change in Diversity Jurisdiction With an Added All-Purpose, All-Cases Application Feature Which Respondent Would Have Defeat the Petition Herein for Writ of Certiorari?

Petitioner, at the outset, apologizes to the Court for the length of the preceeding headnote and what it implies; but we have openly and candidly come to its formulation because of: (a) the expansive language and multiple footnotes in the Lower Court's decision and opinion which has had, upon petitioner's counsel, a profound effect of confusing and obscuring the real meaning of the case, and (b) Respondent's utilization of this double-expression language in opposing the petition for writ of certiorari.

In order to first develop a fair basis for consideration of this question, we call attention to the following:

1. In the Opposition Brief filed with this Court, Respondent's counsel--on the one hand--states that: "Without question, the Fourth Circuit Court of Appeals did state...that the rule announced in Miller v Perry and applied herein was manifestly intended as a substantial change in diversity jurisdiction." (Emphasis supplied)

2. Then--on the other hand--states that: "Rather than rejecting motive as a criterion in determining the validity of the appointment of an out-of-state administrator for diversity jurisdictional purposes, the Lower Court readily acknowledged that 'if there is a valid reason for the appointment...[an individual to such office] that gives to his representative greater substantaility than a mere administrator ad litem, the citizenship of the administrator may be determinative of diversity."

"To hinge the diversity citizenship of the wrongful death action beneficiaries, rather than to that of their representative" was the substantial change intended by the Court. This has been firmly stated by the Court and was clearly demonstrated in the refusal of Petitioner's petition in the Lower Court for Rehearing, wherein the petition pointed out:

> "In view of the clear and explicit language of the statute [28 Sec. 1359] the holding of the Fourth Circuit Court must have the effect, as pointed out earlier, of declaring, as a matter of law, that where the citizenship of

an administrator or personal representative does not coincide with that of the beneficiaries diversity jurisdicition will not be allowed, regardless of the fact that the appointment may never have been made for the purpose or motive of creating diversity jurisdiction. ..... In the final analysis the only rational basis on which the Fourth Circuit Court's decision appears to be premised is a presumption that all forein administrators or personal representatives are collusively and improperly appointed for the purpose and motive of manufacturing diversity jurisdiction."

[Note: Petitioner took this position because the motion to dismiss was brought under the authority of 28 Sec. 1359 and acted upon upon by the District Court and the Fourth Circuit Court under the authority of that specific statute.

In this connection the Lower Court in rendering its decision in the pending case had before it the record from the District Court that presented to it the following statement of the District Court.

"The COURT: ....From a reading of Miller v. Perry, I have reached the conclusion that motivation is not a factor and that the Court has said that the sole issue hinges entirely on the residency--at least until the Institute's proposals are adopted--that the sole factor is the residency of the beneficiaries.

Therefore, for that reason, I am going to grant the motion to dismiss in this case, and certify it for immediate appeal.....If the Fourth Circuit said you could consider motivation, I would overrule your motion to dismiss. I am going to take the position that I cannot consider motivation, and I am going to grant the motion to dismiss." (Pet. Appx. 24)

The self evident fact is that if the Fourth Circuit Court intended

to allow motivation to control or even be considered it would properly have corrected the District Court and returned the case to that Court for further appropriate action. This the Fourth Circuit Court of Appeals did not do.

Finally, it is tellingly obvious that if the real thrust of the Fourth Circuit Court's decision was merely to reaffirm an adherence to application of motivation principle and test there could not have been any claim of the "substantial change in diversity jurisdiction" as claimed and acknowledged by everyone evaluating the action of the Fourth Circuit Court. The basis of that evaluation, wherein it is claimed that the Fourth Circuit Court made a substantial change in diversity jurisdiction, rests entirely upon the following, and nothing more.

The Fourth Circuit Court's rule:

> "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

As heretofore pointed out, the Fourth Circuit Court made no response to the distinct view held by the District Court, an avoidance which clearly signalled the Fourth Circuit Court's departure from the principle and test of motivation, conflicting the other Circuit Courts of the Federal Judiciary. For further

amplification of this point, Petitioner urges particular reading of the concluding portion of the Order of the District Court, appearing on page 26 of the Petition Appendix.

Respectfully submitted,

WILLIAM T. JONES

Attorney for Petitioner